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STATE OF CALIFORNIA

Fish and Game Commission

December 28, 2010

TO ALL AFFECTED AND INTERESTED PARTIES:

On December 16, 2010, the Commission readopted emergency regulations concerning Stewarts Point State Marine Reserve and Stewarts Point State Marine Conservation Area. The Administrative Procedure Act requires that we make this regulation available for public review for at least five working days prior to submitting the regulation to the Office of Administrative Law.

Attached for your review are copies of the notice of emergency regulatory action, the emergency regulatory language in strikeout/underline format, the Statement of Facts Constituting Need for Emergency Action, and the Request for Readoption of Emergency Regulations.

Sincerely,

Sherrie Fonbuena
Associate Governmental Program Analyst

Attachments

TITLE 14. Fish and Game Commission Notice of Emergency Regulatory Action

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 200, 202, 203.1, 205(c), 219, 220, 240, 1590, 1591, 2860, 2861 and 6850 of the Fish and Game Code, and Sections 36725(a) and 36725(e) of the Public Resources Code, and to implement, interpret or make specific sections 200, 202, 203.1, 205(c), 219, 220, 240, 1580, 1583, 2861, 5521, 6653, 8420(e), and 8500 of the Fish and Game Code, and Sections 36700(e), 36710(e), 36725(a) and 36725(e) of the Public Resources Code, proposes to amend Section 632, Title 14, California Code of Regulations (CCR), relating to Stewarts Point State Marine Reserve and Stewarts Point State Marine Conservation Area.

Informative Digest/Policy Statement Overview

A. Laws Related to the Emergency Regulation

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The MLPA requires that the Commission adopt a Marine Life Protection Program that, in part, contains an improved marine reserve (now state marine reserve) component [Fish and Game Code (FGC) subsection 2853(c)(1)] and protects the natural diversity of marine life and the structure, function, and integrity of marine ecosystems [FGC subsection 2853(b)(1)]. This protection may help provide sustainable resources as well as enhance functioning ecosystems that provide benefits to both consumptive and non-consumptive user groups. The program may include MPAs with various levels of protection, from no take of any kind to those that allow for specified commercial and recreational activities, provided that these activities are consistent with the objectives of the area and the goals and guidelines of the MLPA.

On August 5, 2009, the Fish and Game Commission adopted regulations to implement MPAs for California's north central coast, defined as state waters between Alder Creek, near Point Arena (Mendocino County) and Pigeon Point (San Mateo County), including the Stewarts Point State Marine Reserve (SMR) in which take of all living marine resources is prohibited. These regulations became effective May 1, 2010.

B. Effect of the Emergency Action

This amendment of Section 632 will establish the Stewarts Point State Marine Conservation Area (SMCA). The general boundaries of the SMCA will be from the mean high tide line to a line that approximates a distance of 1000 feet offshore, and from the northern boundary of the existing Stewarts Point SMR to just below Rocky Point, approximately four miles south. All

commercial take of living marine resources will be prohibited. The recreational take of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80 (including surf smelt) by hand-held dip net will be authorized consistent with other applicable law.

The proposed SMCA would leave three miles of coastline in SMR status, which meets the minimum science guidelines for coastal protection of nearshore habitats.

C. Policy Statement Overview

The objective of this emergency regulation is to create the Stewarts Point SMCA and to allow specified recreational take of living marine resources within the SMCA.

The regulations as proposed in strikeout-underline format are attached to this notice. Notice of the proposed action shall be posted on the Fish and Game Commission website at <http://www.fgc.ca.gov>.

Section 240 Finding

Pursuant to the authority vested in the Commission by FGC Section 240, and for the reasons set forth in the attached Statement of Facts Constituting Need for Emergency Action, the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the health and safety and general welfare. The Commission specifically finds that the amendment of this regulation will avoid serious harm to the health and safety and general welfare of the Kashia people by allowing them to take living marine resources for subsistence purposes.

Public Comments on Proposed Emergency Regulations

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In order to be considered, public comments on proposed emergency regulations must be submitted in writing to the Office of Administrative Law, 300 Capitol Mall, Room 1250, Sacramento, CA 95814; AND to the Fish and Game Commission, 1416 Ninth Street, Room 1320, Sacramento, CA 95814, or via fax to (916) 653-5040 or via e-mail to fgc@fgc.ca.gov. Comments must identify the emergency topic and may address the finding of emergency, the standards set forth in sections 11346.1 and 11349.1 of the Government Code and Section 240 of the Fish and Game Code. Comments must be received within five calendar days of filing of the emergency regulations. Please refer to OAL's website (www.oal.ca.gov) to determine the date on which the regulations are filed with OAL.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

- (a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (b) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (c) Programs Mandated on Local Agencies or School Districts:

None.

- (d) Costs Imposed on Any Local Agency or School District that is Required to Be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

- (e) Effect on Housing Costs:

None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

Consideration of Alternatives

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Jon K. Fischer
Acting Executive Director

Dated: December 28, 2010

Regulatory Language

Section 632, Title 14, CCR, is amended to read:

...

(11) Stewarts Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 40.500' N. lat. 123° 25.370' W. long.;

38° 40.500' N. lat. 123° 25.500' W. long.;

38° 37.500' N. lat. 123° 23.500' W. long.;

38° 37.535' N. lat. 123° 23.027' W. long.

(B) Take of all living marine resources is prohibited except the following may be taken recreationally from shore only: marine aquatic plants other than sea palm, marine invertebrates, finfish [as identified in subsection 632(a)(2)] by hook and line, surf smelt by beach net, and species authorized in Section 28.80 of these regulations by hand-held dip net.

(11)(12) Stewarts Point State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

38° 40.50' N. lat. 123° 25.37' W. long.;

38° 40.50' N. lat. 123° 30.24' W. long.; thence southward along the three nautical mile offshore boundary to

38° 35.60' N. lat. 123° 26.01' W. long.; and

38° 35.60' N. lat. 123° 20.80' W. long., except that Stewarts Point State Marine Conservation Area as described in subsection 632(b)(11)(A) is excluded.

(B) Take of all living marine resources is prohibited.

~~(12)~~(13) Salt Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 35.60' N. lat. 123° 20.80' W. long.;

38° 35.60' N. lat. 123° 21.00' W. long.;

38° 33.50' N. lat. 123° 21.00' W. long.; and

38° 33.55' N. lat. 123° 18.91' W. long., except that Gerstle Cove as described in subsection ~~632(b)(13)(A)~~ 632(b)(14)(A) is excluded.

(B) Take of all living marine resources is prohibited except the recreational take of abalone and finfish [subsection 632(a)(2)].

...

Subsections 632(b)(13) through 632(b)(14) are renumbered 632(b)(14) through 632(b)(15).

...

~~(15)~~(16) Russian River State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, the mouth of the Russian River estuary as defined in subsection ~~632(b)(14)(A)~~632(b)(15)(A), and straight lines connecting the following points in the order listed:

38° 27.38' N. lat. 123° 08.58' W. long.;

38° 26.38' N. lat. 123° 08.58' W. long.;

38° 26.38' N. lat. 123° 07.70' W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally: Dungeness crab by trap, and surf smelt using hand-held dip net or beach net.

2. Only the following species may be taken commercially: Dungeness crab by trap.

...

Subsections ~~632(b)(16)~~ through ~~632(b)(28)~~ are renumbered ~~632(b)(17)~~ through ~~632(b)(29)~~.

...

~~(29)~~(30) North Farallon Islands Special Closure. Special regulations on boating and access apply to the North Farallon Islands as follows.

(A) A special closure is established at the islets comprising the North Farallon Islands.

(B) Except as permitted by federal law or emergency caused by hazardous weather, or as authorized by subsection ~~632(b)(29)(C)~~632(b)(30)(C), no vessel shall be operated or anchored at any time from the mean high tide line to a distance of 1000 feet seaward of the mean lower low tide line of any shoreline of North Farallon Island, or to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of the remaining three southern islets, including the Island of St. James, in the vicinity of 37° 46.00' N. lat. 123° 06.00' W. long.

(C) No person except department employees or employees of the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter the area defined in subsection ~~632(b)(29)(B)~~632(b)(30)(B).

(D) All vessels shall observe a five (5) nautical mile per hour speed limit within 1,000 feet seaward of the mean lower low tide line of any shoreline of the islets defined in subsection ~~632(b)(29)(B)~~632(b)(30)(B).

(E) In an area bounded by the mean high tide line and a distance of one nautical mile seaward of the mean lower low tide line of any of the four islets comprising the North Farallon Islands, the following restrictions apply:

1. All commercial diving vessels operating in the defined area shall have their vessel engine exhaust system terminate either through a muffler for dry exhaust systems, or below the vessel waterline for wet exhaust systems.

2. All commercial diving vessels equipped with an open, deck-mounted air compressor system, while operating in the defined area, shall have their air compressor's engine exhaust system terminate below the vessel waterline.

...

Subsections 632(b)(30) through 632(b)(31) are renumbered 632(b)(31) through 632(b)(32).

...

~~(32)~~(33) Southeast Farallon Island Special Closure. Special regulations on boating and access apply to the Southeast Farallon Island as follows.

(A) A special closure is established at the Southeast Farallon Island.

(B) Except as permitted by federal law or emergency caused by hazardous weather, or as authorized by subsection ~~632(b)(32)~~(C) ~~632(b)(33)~~(C), no vessel shall be operated or anchored at any time from the mean high tide line to a distance of 300 feet seaward of the mean lower low tide line of any shoreline EXCEPT north of a line at 37° 42.26' N. lat., and inside Fisherman's Bay south of 37° 42.26' N. lat. and north of 37° 42.05' N. lat., and at East Landing, between a line extending due east from 37° 41.83' N. lat. 122° 59.98' W. long. and a line extending from 37° 41.72' N. lat. 123° 00.05' W. long. to 37° 41.68' N. lat. 123° 00.07' W. long. This closure exists year round, except for the southeast side of Saddle (Seal) Rock, between a line extending from 37° 41.76' N. lat. 123° 00.16' W. long. to 37° 41.64' N. lat. 123° 00.16' W. long. and a line extending from 37° 41.60' N. lat. 123° 00.26' W. long. to 37° 41.60' N. lat. 123° 00.32' W. long., which is closed only from December 1 through September 14 of each year.

(C) No person except department employees or employees of the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter the area defined in subsection ~~632(b)(32)~~(B) ~~632(b)(33)~~(B).

(D) All vessels shall observe a five (5) nautical mile per hour speed limit 1,000 feet seaward of the mean lower low tide line of any shoreline of the Southeast Farallon Island.

(E) In an area bounded by the mean high tide line and a distance of one nautical mile seaward of the mean lower low tide line of any of the islands and islets comprising the Southeast Farallon Island, the following restrictions apply:

1. All commercial diving vessels operating in the defined area shall have their vessel engine exhaust system terminate either through a muffler for dry exhaust systems, or below the vessel waterline for wet exhaust systems.
2. All commercial diving vessels equipped with an open, deck-mounted air compressor system, while operating in the defined area, shall have their air compressor's engine exhaust system terminate below the vessel waterline.

...

Subsections 632(b)(33) through 632(b)(105) are renumbered Subsections 632(b)(34) through 632(b)(106).

...

~~(106)~~(107) Dana Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, a distance of 1200 feet seaward of mean lower low water, and the following points:

33° 27.74' N. lat. 117° 42.95' W. long.;

33° 27.74' N. lat. 117° 43.18' W. long.;
33° 27.47' N. lat. 117° 42.28' W. long.; and
33° 27.63' N. lat. 117° 42.45' W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally below the mean lower low-water mark: lobster, rockfish (family Scorpaenidae), greenling, lingcod, cabezon, yellowtail, mackerel, bluefin tuna, kelp bass, spotted sand bass, barred sand bass, sargo, croaker, queenfish, California corbina, white seabass, opaleye, halfmoon, surfperch (family Embiotocidae), blacksmith, Pacific barracuda, California sheephead, Pacific bonito, California halibut, sole, turbot, and sanddab. Finfish shall be taken only by hook and line or by spearfishing gear.

2. Only spiny lobster may be taken commercially.

(C) Except as expressly provided in this section, it is unlawful to enter the intertidal zone in the Dana Point State Marine Conservation Area for the purpose of taking or possessing, or to take or possess, any species of fish, plant, or invertebrate, or part thereof; to use or have in possession any contrivance designed to be used for catching fish; to disturb any native plant, fish, wildlife, aquatic organism; or to take or disturb any natural geological feature. This subdivision does not prohibit persons from entering the intertidal zone for the purpose of entertainment, recreation, and education while having a minimum impact on the intertidal environment and the living organisms therein. For this purpose, minimum impact includes foot traffic; general observation of organisms in their environment with immediate replacement of any unattached organisms to their natural location after temporary lifting for examination; and photography. Minimum impact does not include removal of attached organisms from their environment; gathering of fishing bait; littering, collecting rocks and shells; or turning rocks or other acts destructive to the environment.

(D) The department director may appoint a director of the Dana Point State Marine Conservation Area.

(E) The director of the Dana Point State Marine Conservation Area may issue a special collecting permit authorizing any person to enter the conservation area for the purposes of scientific collecting under the conditions of a scientific collector's permit issued by the department.

(F) Notwithstanding subsections ~~632(b)(89)(B) or 632(b)(89)(C)~~ 632(b)(107)(B) or 632(b)(107)(C), the director of the Dana Point State Marine Conservation Area, or any person who has a scientific collector's permit from the department and to whom the director of the Dana Point State Marine Conservation Area has issued a special collecting permit may take, for scientific purposes, any fish or specimen of marine plant life under the conditions prescribed by the department.

(G) This section does not prohibit the entry of state and local law enforcement officers, fire suppression agencies, and employees of the department in the performance of their official duties. This section does not prohibit or restrict navigation in the Dana Point State Marine Conservation Area pursuant to federal law.

...

Subsequent subsections are renumbered beginning with (108).

Note: Authority cited: Sections 200, 202, 203.1, 205(c), 219, 220, 1590, 1591, 2860, 2861 and 6750, Fish and Game Code; and Sections 36725(a) and 36725(e), Public Resources Code. Reference: Sections 200, 202, 203.1, 205(c), 219, 220, 1580, 1583, 2861, 5521, 6653, 8420(e) and 8500, Fish and Game Code; and Sections 36700(e), 36710(e), 36725(a) and 36725(e), Public Resources Code.

FISH AND GAME COMMISSION
STATEMENT OF FACTS CONSTITUTING NEED FOR EMERGENCY ACTION

Emergency Action to Amend Section 632, Title 14, CCR,
Re: Stewarts Point State Marine Reserve

I. INTRODUCTION

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The MLPA requires that the Fish and Game Commission ("Commission") adopt a Marine Life Protection Program that, in part, contains an improved marine reserve (now state marine reserve) component [Fish and Game Code (FGC) subsection 2853(c)(1)] and protects the natural diversity of marine life and the structure, function, and integrity of marine ecosystems [FGC subsection 2853(b)(1)]. This protection may help provide sustainable resources as well as enhance functioning ecosystems that provide benefits to both consumptive and non-consumptive user groups. The program may include MPAs with various levels of protection, from no take of any kind to those that allow for specified commercial and recreational activities, provided that these activities are consistent with the objectives of the area and the goals and guidelines of the MLPA.

The planning process to implement the MLPA in the north central coast, defined as state waters between Alder Creek, near Point Arena (Mendocino County) and Pigeon Point (San Mateo County), was conducted pursuant to the processes defined in the Commission's revised draft Master Plan for MPAs. The MLPA North Central Coast Regional Stakeholder Group (NCCRSG) began meeting in May, 2007 to develop alternative MPA proposals for the north central coast region. The NCCRSG met during eight one- to two-day meetings and three work sessions between May 2007 and March 2008 before forwarding three proposals to a Blue Ribbon Task Force (BRTF). The BRTF was appointed by the Secretary for Resources to provide policy guidance and oversight to the process. The BRTF created an Integrated Preferred Alternative proposal (IPA) by selecting, and in some cases slightly modifying, MPAs from each of the three NCCRSG proposals with the intent to meet scientific guidelines and achieve the MLPA goals, while also bridging some of the remaining areas of divergence among the NCCRSG proposals. The BRTF recommended that the Commission select the IPA as the regulatory preferred alternative for the north central coast.

On August 5, 2009, the Fish and Game Commission adopted the IPA regulations to implement MPAs for California's north central coast, including the Stewarts Point State Marine Reserve (SMR) in which take of all living marine resources is prohibited. These regulations became effective May 1, 2010.

The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its amendments to Section 632 of Title 14 of the California Code of Regulations. The Commission's amendment of Section 632 as an emergency action under the APA is based, in part, on authority provided by FGC Section 240. This amendment of Section 632 will establish the Stewarts Point State Marine Conservation Area (SMCA) and will provide for the recreational take from shore of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80 (including surf smelt) by hand-held dip net in the SMCA.

As set forth below, the Commission finds that amendment of Section 632 pursuant to FGC 240 constitutes a necessary emergency action by the Commission under the APA. The health and safety of the people of the Kashia Band of Pomo Indians of the Stewarts Point Rancheria are jeopardized by the existing regulation which prohibits them from gathering food for their families. Kashia people fish and gather along the coast within their ancestral lands for subsistence as well as ceremonial purposes. The existing Stewarts Point State Marine Reserve designation is depriving Kashia families of the Stewarts Point Rancheria of access to food.

II. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (§11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, §11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in FGC Section 240. Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing so is necessary for the immediate preservation of the public peace, health and safety, or general welfare. The Commission finds that such necessity exists in the present case.

The recent creation of the Stewarts Point SMR created an unforeseen situation. Creation of the Stewarts Point SMR inadvertently prohibited Kashia people from fishing and gathering for subsistence purposes. The issue of Kashia Pomo tribal uses of coastal resources was not considered by the BRTF which proposed the North Central Coast regulation to the Commission.

Immediate action is needed to avoid serious harm to the health and safety and general welfare of the Kashia people. There are approximately 800 Tribal members, about 450 of whom are adults. Approximately 150 adults fish and gather; of those, less than 20 (who live on the Rancheria at Stewarts Point) fish or gather two or three times per week. There are probably 100 members who regularly engage in gathering. Much of the gathering is done by younger tribal members for elders. The Rancheria has 80 percent unemployment, is in a remote location, with a poor access road, and with few opportunities within a long, winding drive. Fishing is a source of food. Gathering sea weed and shellfish is also a source of food. Younger tribal members gather for the elders of the Rancheria who can no longer gather food for themselves. Rancheria residents do not fish or gather for commercial purposes; they do not smoke, can or otherwise store food in bulk. The current prohibition on take of living marine resources in Stewarts Point SMR denies the Kashia people access to food, shrinks appreciably the available sources of food, and by forcing them to go elsewhere, increases the time, cost and risk of gathering food (Stewarts Point is accessible; there are no steep hills, high bluffs, sheer drops, which make access to the resources unsafe.) Access to a primary source of food is a health and safety issue, directly related to the general welfare of the community.

III. Express Finding of Emergency

Pursuant to the authority vested in the Commission by FGC Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the health and safety and general welfare. The Commission specifically finds that the amendment of this regulation will avoid serious harm to the health and safety and general welfare of the Kashia people by allowing them to take living marine resources for subsistence purposes.

IV. Authority and Reference Citations

Authority: Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1590, 1591, 2860, 2861 and 6850 of the Fish and Game Code, and Sections 36725(a) and 36725(e) of the Public Resources Code.

Reference: Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1580, 1583, 2861, 5521, 6653, 8420(e), and 8500 of the Fish and Game Code, and Sections 36700(e), 36710(e), 36725(a) and 36725(e) of the Public Resources Code.

V. Informative Digest

A. Laws Related to the Emergency Regulation

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The MLPA requires that the Commission adopt a Marine Life Protection Program that, in part, contains an improved marine reserve (now state marine reserve) component [Fish and Game Code (FGC) subsection 2853(c)(1)] and protects the natural diversity of marine life and the structure, function, and integrity of marine ecosystems [FGC subsection 2853(b)(1)]. This protection may help provide sustainable resources as well as enhance functioning ecosystems that provide benefits to both consumptive and non-consumptive user groups. The program may include MPAs with various levels of protection, from no take of any kind to those that allow for specified commercial and recreational activities, provided that these activities are consistent with the objectives of the area and the goals and guidelines of the MLPA.

On August 5, 2009, the Fish and Game Commission adopted regulations to implement MPAs for California's north central coast, defined as state waters between Alder Creek, near Point Arena (Mendocino County) and Pigeon Point (San Mateo County), including the Stewarts Point State Marine Reserve (SMR) in which take of all living marine resources is prohibited. These regulations became effective May 1, 2010.

B. Effect of the Emergency Action

This amendment of Section 632 will establish the Stewarts Point State Marine Conservation Area (SMCA). The general boundaries of the SMCA will be from the mean high tide line to a line that approximates a distance of 1000 feet offshore, and from the northern boundary of the existing Stewarts Point SMR to just below Rocky Point, approximately four miles south. All commercial take of living marine resources will be prohibited. The recreational take of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80 (including surf smelt) by hand-held dip net will be authorized consistent with other applicable law.

The proposed SMCA would leave three miles of coastline in SMR status, which meets the minimum science guidelines for coastal protection of nearshore habitats.

C. Policy Statement Overview

The objective of this emergency regulation is to create the Stewarts Point SMCA and to allow specified recreational take of living marine resources within the SMCA.

VII. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC Section 240. The Commission held a public hearing on this regulation on June 24, 2010, and the above finding that this regulation is necessary for the immediate preservation of the health and safety and general welfare meets the requirements of Section 240.

VIII. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

- (a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:
None.
- (b) Nondiscretionary Costs/Savings to Local Agencies:
None.
- (c) Programs Mandated on Local Agencies or School Districts:
None.
- (d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:
None.
- (e) Effect on Housing Costs:
None.

FISH AND GAME COMMISSION
REQUEST FOR READOPTION OF EMERGENCY REGULATIONS

Emergency Action to Readopt Amendments to Section 632, Title 14, CCR,
Re: Stewarts Point State Marine Reserve
and Stewarts Point State Marine Conservation Area

Request for Readoption of Emergency Regulation:

The Fish and Game Commission ("Commission") requests to readopt amendments to Section 632, Title 14, California Code of Regulations ("CCR") [Office of Administrative Law (OAL) file number 2010-0709-02E]. The Findings of Emergency for this file containing the following information: Statement of Facts Constituting Need for Emergency Action; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; Standard Form 399, is hereby incorporated by reference. The objective of this regulation is to maintain the Stewarts Point State Marine Conservation Area (SMCA) to allow specified recreational take of living marine resources within the SMCA while the Commission completes its standard rulemaking process for this regulation.

Emergency Regulation in Effect to Date:

On June 24, 2010, the Commission adopted emergency regulations to establish the Stewarts Point SMCA and provide for the recreational take from shore of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80, Title 14, CCR, (including surf smelt) by hand-held dip net in the SMCA. Pursuant to Government Code ("GC") sections 11346.1(e) and (h), emergency regulations are effective for 180 days. OAL may approve two readoptions, each for a period not to exceed 90 days. In the absence of readoption, the 2084 regulation will expire on January 18, 2011.

Statement of Emergency:

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (§11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, §11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in Section 240 of the Fish and Game Code ("FGC"). Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing

so is necessary for the immediate preservation of the public peace, health and safety, or general welfare. The Commission finds that such necessity exists in the present case.

The recent creation of the Stewarts Point State Marine Reserve (SMR) created an unforeseen situation. Creation of the Stewarts Point SMR inadvertently prohibited Kashia people from fishing and gathering for subsistence purposes. The issue of Kashia Pomo tribal uses of coastal resources was not considered by the Blue Ribbon Task Force which proposed regulations for marine protected areas on the North Central Coast to the Commission.

Immediate action is needed to avoid serious harm to the health and safety and general welfare of the Kashia people. There are approximately 800 Tribal members, about 450 of whom are adults. Approximately 150 adults fish and gather; of those, less than 20 (who live on the Rancheria at Stewarts Point) fish or gather two or three times per week. There are probably 100 members who regularly engage in gathering. Much of the gathering is done by younger tribal members for elders. The Rancheria has 80 percent unemployment, is in a remote location, with a poor access road, and with few opportunities within a long, winding drive. Fishing is a source of food. Gathering sea weed and shellfish is also a source of food. Younger tribal members gather for the elders of the Rancheria who can no longer gather food for themselves. Rancheria residents do not fish or gather for commercial purposes; they do not smoke, can or otherwise store food in bulk. The current prohibition on take of living marine resources in Stewarts Point SMR denies the Kashia people access to food, shrinks appreciably the available sources of food, and by forcing them to go elsewhere, increases the time, cost and risk of gathering food (Stewarts Point is accessible; there are no steep hills, high bluffs, sheer drops, which make access to the resources unsafe.) Access to a primary source of food is a health and safety issue, directly related to the general welfare of the community.

Given that the emergency circumstances that necessitated the original emergency regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency be incorporated to supplement this justification.

Compliance with Readoption Criteria

(1) Same or Substantially Equivalent:

Pursuant to GC section 11346.1(h), the text of a readopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The proposed language for the readopted emergency regulation is the same as the language of the original emergency regulation. The text of both regulations establishes the Stewarts Point SMCA and provides for the recreational take from shore of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80, Title 14, CCR, (including surf smelt) by hand-held dip net in the SMCA.

(2) Substantial Progress:

GC section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making "substantial progress and has proceeded with due diligence" to comply with the standard rulemaking provisions. The Commission has complied with this requirement publishing notice of its intent to adopt this regulation pursuant to the standard rulemaking process. The notice (OAL Notice #Z2010-1109-05) was published on November 19, 2010. The Commission held a discussion hearing on the proposed regulation on December 16, 2010 and is scheduled to consider adoption of the regulation on February 3, 2011.

Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC Section 240. The Commission held a public hearing on this regulation on December 16, 2010, and the finding that this regulation is necessary for the immediate preservation of the health and safety and general welfare meets the requirements of Section 240.

